

1 KEKER & VAN NEST LLP  
ROBERT A. VAN NEST - # 84065  
2 BRIAN L. FERRALL - # 160847  
DAVID SILBERT - # 173128  
3 MICHAEL S. KWUN - #198945  
633 Battery Street  
4 San Francisco, CA 94111-1809  
Telephone: (415) 391-5400  
5 Email: rvannest@kvn.com;  
bferrall@kvn.com; dsilbert@kvn.com;  
6 mkwun@kvn.com

SUSAN CREIGHTON, SBN 135528  
SCOTT A. SHER, SBN 190053  
WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation  
1700 K Street NW, Fifth Floor  
Washington, D.C., 20006-3817  
Telephone: (202) 973-8800  
Email: screighton@wsgr.com;  
ssher@wsgr.com

7  
8 JONATHAN M. JACOBSON, NY SBN 1350495  
CHUL PAK (*pro hac vice*)  
DAVID H. REICHENBERG (*pro hac vice*)  
9 WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation  
10 1301 Avenue Of The Americas, 40th Floor  
New York, NY 10019-6022  
11 Telephone: (212) 999-5800  
Email: jjacobson@wsgr.com; cpak@wsgr.com;  
12 dreichenberg@wsgr.com

13 Attorneys for Defendant  
14 ARISTA NETWORKS, INC.

15 UNITED STATES DISTRICT COURT  
16 NORTHERN DISTRICT OF CALIFORNIA  
17 SAN JOSE DIVISION

18 CISCO SYSTEMS, INC.,

19 Plaintiff,

20 v.

21 ARISTA NETWORKS, INC.,

22 Defendant.

Case No. 5:14-cv-05344-BLF (NC)

**DEFENDANT ARISTA NETWORKS,  
INC.'S OPPOSITION TO CISCO'S  
MOTION *IN LIMINE* NO. 5 TO  
EXCLUDE TESTIMONY FROM TERRY  
EGER**

Judge: Hon. Beth Labson Freeman

Date Filed: December 5, 2014

Trial Date: November 21, 2016

23  
24  
25 **REDACTED PUBLIC VERSION**  
26  
27  
28

## I. INTRODUCTION

Cisco's attempt to exclude *in limine* the testimony of its own former head of sales during a critical period in Cisco's history should be rejected for what it is: an effort to keep from the jury testimony that confirms Cisco has long treated CLI commands as open for others to use and part of an overarching corporate goal of promoting interoperability. Cisco's justification boils down to two attacks: that Mr. Eger lacks personal knowledge because he was a salesman, not an engineer; and that Mr. Eger's experience dates to Cisco's formative period, making it, in Cisco's view, irrelevant. Neither attack withstands scrutiny.

## II. ARGUMENT

### A. As former head of Cisco Worldwide Sales, Mr. Eger has extensive personal knowledge concerning Cisco's customer- and competitor-facing conduct concerning the use of industry standard CLI elements.

Terry Eger served as Cisco's Vice President of Worldwide Sales from 1988–1992, when CLI commands in Cisco's router operating system were called "telenetting" or "configuration" commands. *See* Declaration of Ryan Wong in Support of Arista Network's Oppositions to Cisco's Motions In *Limine* Nos. 1-5 ("Wong Decl."), Ex. 31 (Eger Depo.) at 27:23–28:1; 92:6–92:25; 96:2–7. During that time, he sold and oversaw the marketing of Cisco's early router products. *Id.* at 104:17–105:5. At his deposition, Mr. Eger himself explained that the testimony he is [REDACTED]." *Id.* at 88:9–11.

Mr. Eger will testify at trial, as he did in his deposition, that during his tenure as head of sales and marketing, Cisco competed with other networking companies by telling customers that

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at 96:8–97:6.<sup>1</sup> Indeed, Mr. Eger testified that Cisco

<sup>1</sup> *See also id.* at 101:16–20 [REDACTED]

[REDACTED]

1 and its competitors [REDACTED]

2 [REDACTED] *Id.* at 69:22–70:14;  
3 73:11–19; 75:8–20 [REDACTED]

4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 Cisco's personal-knowledge attack is meritless. "Testimony should not be excluded for  
10 lack of personal knowledge unless *no reasonable juror* could believe that the witness had the  
11 ability and opportunity to perceive the event that he testifies about." *United States v. Hickey*, 917  
12 F.2d 901, 904 (6th Cir. 1990) (citing cases) (emphasis added).<sup>2</sup> As former head of Cisco  
13 worldwide sales, Mr. Eger can testify as to his personal experience selling and marketing Cisco's  
14 products.

15 **B. Mr. Eger's testimony is highly relevant to Arista's defenses and Cisco's**  
16 **claims of originality.**

17 Mr. Eger's testimony confirms Arista's fair use and other defenses, and undermines  
18 Cisco's claims of originality. For years, [REDACTED]

19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED] It is only now, when Arista presents a competitive  
22 threat to Cisco, that it has changed its tune.

23  
24 [REDACTED]  
25 <sup>2</sup> See also Fed. R. Evid. 602, adv. cttee. notes to 1972 Proposed Rules ("[A] witness who testifies  
26 to a fact which can be perceived by the senses must have had an opportunity to observe, and must  
27 have actually observed the fact."); *Stuart v. UNUM Life Ins. Co. of Am.*, 217 F.3d 1145, 1155 (9th  
28 Cir. 2000) (reversing trial court's exclusion of testimony of Vice President of Corporate Services  
regarding personal knowledge of relevant transaction); *United States v. Thompson*, 559 F.2d 552,  
553 (9th Cir. 1977) (affirming trial court's denial of motion to exclude restaurant manager's  
testimony concerning restaurant's procedures based on lack of personal knowledge).

1 The relevance of Mr. Eger's testimony is clear. With respect to originality, Mr. Eger  
 2 refutes Cisco's claim that it alone developed the CLI commands it asserts in this case. Cisco's  
 3 motion makes much of Mr. Eger's lack of familiarity with the specific commands at issue in this  
 4 case, complaining that he was not an engineer who worked on the development of the CLI. But  
 5 in his sales role, Mr. Eger had significant, relevant exposure to how Cisco billed its CLI to  
 6 customers and the industry at large. Indeed, [REDACTED]—Cisco's asserted  
 7 operating system. Wong Decl., Ex. 31 (Eger Depo.) at 97:12–25; 102:12–13 [REDACTED]  
 8 [REDACTED] And Cisco claims that 58 of the roughly 500 asserted CLI commands—over 10%—  
 9 were first adopted in Cisco's software during or shortly before the years that Mr. Eger sold and  
 10 marketed Cisco's products that contained those same commands. Wong Decl., Ex. 30 (Cisco's  
 11 Eighth Supplemental Response Amended Ex. F) (highlighting relevant commands). Mr. Eger's  
 12 experience as head of Cisco sales during that period was that he and others at Cisco told  
 13 customers that Cisco's commands [REDACTED]. Cisco may challenge Mr.  
 14 Eger's memory of particular commands on cross-examination if it chooses, but it cannot stop the  
 15 jury from hearing his highly relevant testimony.

16 Mr. Eger's testimony is central to fair use as well. The second statutory factor of fair  
 17 use—the nature of the copyrighted work—recognizes that “if a work is largely functional, it  
 18 receives only weak protection.” *Sega Enters., Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1527 (9th  
 19 Cir. 1992) (citation omitted). Factor two supports fair use “[w]here the nature of the work is such  
 20 that purely functional elements exist in the work and it is necessary to copy the expressive  
 21 elements in order to perform those functions.” *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339,  
 22 1375 (Fed. Cir. 2014) (citing *Sega*, 977 F.2d at 1526). As Judge Alsup recently held in denying  
 23 Oracle's motion for a new trial in *Oracle v. Google*, even if the jury there found that Cisco's CLI  
 24 commands “were creative enough to qualify for copyright protection,” they could also reasonably  
 25 have found that “functional considerations predominated in their design, and thus Factor Two was  
 26 not a strong factor in favor of Oracle.” *Oracle Am., Inc. v. Google Inc.* (“*Oracle II*”), No. C 10-  
 27 03561-WHA, 2016 WL 3181206, at \*10 (N.D. Cal. June 8, 2016). Mr. Eger's testimony about  
 28 how Cisco portrayed its CLI commands to customers and competitors—[REDACTED]

1 [REDACTED] is thus directly relevant to the question of the nature of the  
2 copyrighted work.

3 The same testimony bears on the fourth statutory factor as well: “the effect of the use  
4 upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). In  
5 connection with factor four, the jury will consider whether there was “unrestricted and  
6 widespread conduct of the sort engaged in by” Arista in the relevant market. *Campbell v. Acuff-*  
7 *Rose Music, Inc.*, 510 U.S. 569, 590 (1994). In *Oracle v. Google*, the jury was entitled to find  
8 that factor four weighed in favor of Google because the asserted APIs were “available as free and  
9 open source,” which “invited anyone to subset the API . . . . [The] jury could reasonably have  
10 found that [Google’s] impact on the market for the copyrighted works paralleled what [Oracle]  
11 already expected.” *Oracle II*, 2016 WL 3181206, at \*10. Here, the jury can rely on Mr. Eger’s  
12 testimony concerning [REDACTED]

13 [REDACTED]  
14 Finally, this Court has already recognized that fair use is “appropriate where a ‘reasonable  
15 copyright owner’ would have consented to the use, *i.e.*, where the ‘custom or public policy’ at the  
16 time would have defined the use as reasonable.” Order Denying MSJs, ECF 482 at 8:21–22  
17 (citing *Wall Data Inc. v. Los Angeles Cnty. Sheriff’s Dept.*, 447 F.3d 769, 778 (9th Cir. 2006)).  
18 The jury is entitled to rely on Mr. Eger’s testimony that [REDACTED]

19 [REDACTED]  
20 [REDACTED]  
21 **C. Arista timely disclosed Mr. Eger as a witness, and Cisco had an opportunity**  
22 **to depose him.**

23 Cisco’s motion admits that Arista disclosed Mr. Eger as a potential witness with relevant  
24 knowledge in March 2016, even though it was Cisco that employed him. Though Arista’s  
25 counsel has never represented Mr. Eger, Arista was able to disclose that Mr. Eger’s testimony  
26 would be relevant to several of Arista’s defenses, including fair use. Then, in May 2016, Cisco  
27 deposed Mr. Eger, during which Cisco questioned him about the development of IOS and Cisco’s  
28 marketing and sales of its products during and after the time that Mr. Eger worked at Cisco—

1 testimony that Cisco discusses in its motion.

2 Yet, inexplicably, Cisco now claims that it suffered prejudice from Arista's addition of the  
 3 phrases "Development of IOS" and "Cisco's marketing and sales of its products" to its witness  
 4 list for Mr. Eger just after Mr. Eger's deposition took place. Cisco's motion does not explain how  
 5 those additional phrases differ in any meaningful way from Arista's prior disclosure—indeed,  
 6 they merely provide a subset of topics encompassed by Arista's prior disclosure, informed by Mr.  
 7 Eger's own testimony in response to Cisco's questioning. Nor does Cisco explain how it could  
 8 be prejudiced by the disclosure of topics that Cisco itself asked about at Mr. Eger's deposition.  
 9 Not surprisingly, Cisco does not, and cannot, cite a single authority for the proposition that Cisco  
 10 was entitled to question Mr. Eger about these topics in deposition, but Arista is prevented from  
 11 doing the same at trial. Cisco's attempt to seek preclusion of Mr. Eger's testimony on this basis  
 12 is meritless.

### 13 **III. CONCLUSION**

14 Mr. Eger was Cisco's head of worldwide sales for four years during Cisco's formative  
 15 years, [REDACTED]

16 [REDACTED]  
 17 [REDACTED] It is not surprising that Cisco wants to keep that testimony out of the  
 18 hearing of the jury, but it is clearly relevant, Mr. Eger himself experienced it and therefore has  
 19 personal knowledge of it, and Cisco had a full seven hours to question him about it. There is no  
 20 basis to grant Cisco's motion; the Court should deny it.

21 Dated: October 7, 2016

KEKER & VAN NEST LLP

24 By: s/ Robert A. Van Nest  
 ROBERT A. VAN NEST

26 Attorney for Defendant  
 ARISTA NETWORKS, INC.